TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 422

WILLIAM LINK, PETITIONER,

vs.

WABASH RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1961
CERTIORARI GRANTED NOVEMBER 20, 1961

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 19, 1961

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Appellant's Record Appendix

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

STATEMENT PURSUANT TO RULE 12(C) OF THE CIRCUIT COURT OF APPEAL RULES

On August 24, 1954, the plaintiff filed complaint.

On September 17, 1954, George T. Schilling and John F. Bodle, 801 Lafayette Life Bldg. Lafayette, Ind. entered appearance for defendant and filed answer.

On April 30, 1955, defendant filed motion for judgment on the pleadings.

On October 18, 1955 the parties were present by counsel and hearing was held on defendant's motion for judgment on the pleadings. Arguments were heard and the motion submitted to the court and taken under advisement.

On November 30, 1955, an order of dismissal was entered and the defendant's motion for judgment on the pleadings granted. It was ordered that the cause be dismissed at plaintiff's costs. (Swygert: J).

On December 28, 1955, notice of appeal was filed.

On March 13, 1957, the mandate from the Circuit Court of Appeals was filed showing judgment of this court reversed, with costs, and the cause was remanded for trial. It was ordered that the appellant William Link recover against the Appellee, the Wabash Railroad Co. the sum of $73.00 for his costs herein expended.

On June 27, 1957 on motion of the plaintiff, and defendant not objecting, the trial scheduled for July 17, 1957 was continued.

[fol. 2] On August 17, 1957 the defendant filed interrogatories.

On February 24, 1959, notice pursuant to Rule 11 was entered, that cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

On March 24, 1959, the plaintiff filed answer to interrogatories and filed motion for default judgment against defendant.

On March 25, 1959, hearing was had on Show Cause order and matter taken under advisement.

On June 4, 1959, order was entered retaining case on the docket and the matter was set for trial July 22, 1959.

On July 2, 1959, order was entered continuing trial setting until further assignment of the court.

On October 12, 1960 the defendant was present by counsel and plaintiff counsel did not appear. Pursuant to the inherent powers of the court and upon failure of plaintiffs counsel to appear at pre-trial, which was scheduled for this day, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause was dismissed and copies of this order forwarded to counsel of record.

On November 10, 1960, the plaintiff files notice of appeal, together with appeal bond.

This is to certify that the following is a true and full copy of the docket entries in the above entitled cause.

8-24-54 Complaint filed. Summons issued and forwarded to Marshal at S.B.

8-31-54 Summons returned served 8-27-54 (4.40).

[fol. 3]

9-17-54 George T. Schilling & John F. Bodle, 801 Lafayette Life Bldg. Lafayette, Ind. files appearance for defendant. Defendant files answer.

4-30-55 Defendant files motion for judgment on the pleadings with certificate of service attached.

10-18-55 Parties present by counsel. Hearing held on defendants motion for judgment on the pleadings. Arguments heard. Motion submitted and taken under advisement.

11-30-55 Order of dismissal entered. Defendant's motion for judgment on the pleadings is granted. It is ordered that this cause be and it is hereby dismissed at plaintiffs costs (copies to counsel). (SE). Swygert: J

12-28-55 Notice of appeal filed. (Certified copy sent to George Schilling). Appeal bond filed. Statement of points on appeal filed. Designation of record on appeal filed with proof of service of the above.

3-13-57 Mandate from Circuit Court of Appeals filed showing judgment of this court reversed, with costs, and this cause is remanded for trial. It is further ordered that appellant William Link, recover against the appellee, The Wabash Railroad Co. the sum of $73.00 for his costs herein expended. Opinion attached thereto.

6-21-57 Plaintiff files motion to continue trial setting.

6-27-57 On motion of plaintiff, defendant not objecting, the trial scheduled for July 17, 1957, is continued until further setting.

8-17-57 Defendant files interrogatories propounded to the plaintiff William Link. Cert. of service attached.

2-24-59 Notice forwarded to counsel that cause will be dismissed on March 25, 1959 pursuant to Rule 11, unless the court orders otherwise.

[fol. 4]

3-24-59 Pltf. files answer to defts. interrogatories. Plaintiff files motion for default judgment against defendant.

3-25-59 Attorney Darlington present for plaintiff. Attorney Schilling present for deft. Hearing held on Show Cause order under Rule 11. Matter taken under adv. Deft. to file certain motions 3-26-59. Plaintiff to have 10 days in which to reply. Deft. 5 days to respond.

6- 4-59 Order entered retaining case on docket. Set for trial 7-22-59 (SE). Swygert: J (Copies to counsel).

7- 2-59 Order entered continuing trial setting until further assignment by the court. (SE) Swygert: J (copies to counsel).

3-11-60 Deft. files interrogatories propounded to the pltf. Wm. Link with certificate of service attached thereto.

3-19-60 Plaintiff files motion to extend time to answer interrogatories.

3-22-60 Order entered granting plaintiff time within which to answer interrogatories to and including Apr. 15, 1960.

4-15-60 Plaintiff files answers to defts. addl. interrog.

10-12-60 Defendant present by counsel. Plaintiff counsel not present. Pursuant to the inherent powers of the court, and upon failure of plaintiffs counsel to appear at a pre-trial, which was scheduled for today October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not

appearing at said pre-trial, the cause is now dismissed (copies to counsel).

11-10-60 Plaintiff files notice of appeal, together with appeal bond. Clerk's certificate and copy of notice mailed to attys. for deft.

11-28-60 [fol. 5] Conference had at the request of plaintiff counsel. Counsel for both sides present in open court. At the conclusions of the conference, the court indicates that nothing presently pends before the court upon which the court might act and the conference is thereupon terminated. (Reported by Paul Brookins, Rm. 1001, 180 W. Wash. Chgo. 2, Ill.).

Attest: /s/ Kenneth Lackey
Clerk

By /s/ Jean Erickson
Deputy

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Page No.	Pleading	Date Filed

Attached hereto is the printed record as certified to in a previous appeal of the above entitled cause of action, said printed record numbers pages 1 through 12 and consists of the following:

Statement under Rule 10(b) (of Court of Appeals)

Certificate of Clerk of the U. S. District Court as to Record.

Complaint

Answer

Motion for judgment on the pleadings

Order of dismissal

Notice of Appeal

Order (July 2, 1959)

At defendant's request, to which request plaintiff agrees, the trial of this case set for July 22, 1959 is continued until further assignment by the Court.

Enter:

Luther M. Swygert, Judge.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, WILLIAM LINK—Filed March 11, 1960

Pursuant to Rule 33 of the Rules of Civil Procedure the defendant, Wabash Railroad Company, propounds the following interrogatories to the plaintiff, William Link, to be answered by him in writing, under oath, and in the manner and at the time specified under Rule 33, and in accordance with present Rule 8 of the Rules of the United States District Court for the Northern District of Indiana:

1. What is the address of your present residence?

2. At what addresses have you resided since March 24, 1959, which are not listed in your answer to the preceding interrogatory.

3. State the total compensation earned by you during the year 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

[fol. 7] 4. State the name and address of every person, firm or corporation by whom you have been employed since March 24, 1959.

5. As to each employer listed in your answer to the preceding interrogatory state:

(a) the nature of the business of such employer,

(b) the nature of your work for such employer,

(c) the date on which your employment commenced and the date on which your employment terminated,

(d) the average number of hours you worked each week,

(e) the rate or rates by which your compensation was computed,

(f) the total compensation earned by you.

6. State the dates and periods of time on and during which you have been a patient in a hospital or clinic

since March 24, 1959 and state the address of each such hospital or clinic.

7. State as to each hospital or clinic listed in your answer to the preceding interrogatory, the total charges made for the services rendered by such hospital or clinic and state the date and amount of every payment made by you or on your behalf on account of such charge.

8. State the name and address of each physician or surgeon who has examined you or who has been consulted by you or who has been consulted by anyone on your behalf since March 24, 1959.

9. State the date and place when and where each such examination or consultation took place and state the names and addresses of all persons who were present at the time of each such examination or consultation.

Stuart, Branigin, Ricks & Schilling, By Russell H. Hart, 801 Lafayette Life Building, Lafayette, Indiana, Phone SHerwood 2-8485, Attorneys for Defendant.

[fol. 8] (Appended Certificate of Service of above is omitted here.)

In United States District Court

Order (March 22, 1960)

Pursuant to plaintiff's motion to extend time to answer interrogatories, it is

Ordered that the time for plaintiff to answer interrogatories be extended to and including April 15, 1960.

Robert H. Grant, Judge.

In United States District Court

Plaintiff's Answers to Defendant's Additional Interrogatories Filed March 11, 1960—Answers filed April 15, 1960

Comes now the plaintiff and makes the following answers to defendant's said additional interrogatories:

1. R. R. 5, Valparaiso, Indiana.

2. Only as stated in No. 1.

3. For year 1959, $4,160.00 gross, and approximately $3,848.00 take-home. Figures for years 1951-1958 not presently in hands of plaintiff's counsel as this is written, but will be supplied in supplemental answer.

4. Rhoda's Truck Service, Valparaiso, Indiana, only.

5(a). Trucking, and selling and service of industrial machinery.

5(b). Salesman.

5(c). About April 1, 1958 and still continue.

5(d). About fifty hours per week.

5(e). Weekly salary, gross $80.00 per week, take-home approximately $74.00 per week.

5(f). Approximately $8400.00 gross and approximately $7844.00 take-home.

6. None.

7. None.

8. None.

9. None.

William Link

[fol. 9] (Plaintiff's affidavit verifying above answers (Tr. 20) is not printed here.)

In United States District Court

Order Dismissing Case—October 12, 1960

Order Book Entry: Luther M. Swygert: J.

October 12, 1960

Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed.

Luther M. Swygert, Judge.

In United States District Court

Notice of Appeal—Filed November 10, 1960

The above named plaintiff, William Link, hereby gives notice that he appeals to the United States Court of Appeals for the Seventh Circuit, from the final order and judgment entered herein by the United States District Court for the Northern District of Indiana, Hammond Division, (from which this appeal is taken), which order and judgment was entered October 12, 1960, dismissing the plaintiff's action herein.

Jay E. Darlington, Attorney for Plaintiff-Appellant.

(Clerk's certificate of mailing above notice on November 10, 1960 (Tr. p. 22) and Appeal Bond of $250, filed November 10, 1960 (Tr. 24) are not printed here.)

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil Action No. 1639

WILLIAM LINK, Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Defendant.

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, commencing Wednesday, October 12, 1960, at 3:00 o'clock P. M.

Appearances:

John F. Bodle, Esq., of Lafayette, Indiana, representing the defendant.

PROCEEDINGS OF OCTOBER 12, 1960

The Court: This is the case of William Link vs. the Wabash Railroad Company, with regard to the pretrial hearing.

Do you care to address the Court, Mr. Bodle?

Mr. Bodle: May I say to the Court, we received a notice of this pretrial hearing on September 30, and I am, of course, present, and have been since 1:00 o'clock for the purpose of attending the pretrial. As we all know, neither the plaintiff nor his counsel have appeared.

I understand that the matter now before the Court rests entirely with relation to this failure of plaintiff and his counsel to appear on the pretrial.

[fol. 11] The Court: Did you hear from Mr. Darlington previous to today?

Mr. Bodle: Yes, sir, at about 10:30 Daylight Time yesterday morning I had a telephone call from Mr. Darlington, stating he was in Indianapolis, and he stated that he expected to be here. He didn't know, however, if he would be able to attend a deposition which I was to take of his plaintiff pursuant to a notice which I had given on the 30th of September, by mail. He told me he wasn't prepared to say if he would or would not be present at that deposition.

As it turned out, he isn't present before the Court now and he wasn't there this morning at the stated place and time for the deposition.

The Court: Was he there at all during the time you waited for him?

Mr. Bodle: No, sir. I waited in Gavit and Eichhorn's office until I received a call from Miss Griffith at 11:30 Daylight Time, in which I was advised that Mr. Darlington had called the Court from Indianapolis, and had indicated some doubt that he would be here for the pretrial.

That is the extent of the contact I've had from Mr. Darlington since the time the Court sent out its notice of the pretrial.

This, of course, as the Court will recall, is a case which was up for dismissal on the Court's own motion on local Rule 11 some time ago, and I would suggest to the Court the fact that the record doesn't show that there has ever been any trial setting requested by the plaintiff since that time, and he, of course, is not here in person or by counsel this afternoon, and—

The Court: (Interposing) What did Mr. Darlington say as to why he couldn't be present?

Mr. Bodle: He told me he thought he could be here for the [fol. 12] pretrial this afternoon. He told me his reason for being in Indianapolis—that he was doing some work on some papers. I understand he was getting ready to file some papers, but he didn't inform me specifically as to the Court or the case.

The Court: He didn't indicate to you he was engaged before a Court during this time?

Mr. Bodle: No, sir.

The Court: Is there anything else?

Mr. Bodle: I think, so far as the evidence presented before the Court is concerned, relating to the pretrial, that is about all the information I have, your Honor.

It is, of course, true that there have been delays in other respects by the plaintiff. There are certain interrogatories still unanswered, but I have no motion presently pending with relation to those matters. Today, however, we are concerned with plaintiff's failure to appear for the pretrial.

The Court: I have asked Miss Griffith to come into the courtroom, and I would like to ask you, Miss Griffith, to recall as best as you can and state what Mr. Darlington said to you this morning when he called, and what you might have said to him.

Miss Griffith: He called about 10:45, and said he was in Indianapolis—that he was busy preparing papers to file with the Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.

At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you. I asked him if he had contacted Mr. Bodle, and he said he had yesterday, and he said that he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition.

[fol. 13] The Court: What did you tell him?

Miss Griffith: I told him I would talk to you, and I did ask if he knew where Mr. Bodle was today, and he said yes, that he was at Gavit and Eichhorn's office and was supposed to be taking a deposition, so I said I would call him, and he asked me to convey the message to you before calling Mr. Bodle.

The Court: That is all, as you recall it, that was said?

Miss Griffith: Yes sir.

The Court: Thank you. Under the circumstances, what is your thinking, Mr. Bodle?

Mr. Bodle: I would certainly suggest to the Court that it has inherent authority to dismiss cases, not only under its own local rule concerning prosecution, but it has inherent power, without any specific rule, by virtue of Federal Rule 83, and the inherent power of the Court to dismiss where

the Court thinks it necessary under the particular situations not provided for by any specific local rule.

It is my understanding that Local Rule 12 was for pretrials—or rather that local Rule 12, under which pretrials may be held on notice to counsel, which notice has been given, your Honor, under that local rule in this case, and it certainly seems to me that this is a case for the Court to exercise its inherent power to order a dismissal for the failure of the plaintiff to appear pursuant to the notice of pretrial, particularly since no attempt was made at any time by plaintiff or his counsel to give any real compelling reason or any substantial advance notice as to why a resetting might be desired. In fact, no formal notice of any kind was ever received from the plaintiff in that regard.

The Court: Miss Griffith, from the time you sent notices to Mr. Darlington and Mr. Bodle, have you ever heard from him insofar as any request for a continuance is concerned? [fol. 14] Miss Griffith: No, sir.

The Court: Have you ever heard from him insofar as any request for a continuance is concerned because of the fact he couldn't be here or didn't intend to be here?

Miss Griffith: Not until today.

The Court: When was the notice sent?

Miss Griffith: I have just my own note that a pretrial notice was sent on September 29.

The Court: You received the notice?

Mr. Bodle: We did, your Honor. Our law firm received that notice in Lafayette certainly by September 30, because it was on that date that I wrote a letter to Mr. Darlington concerning the deposition, and I sent him a notice of the deposition on that date.

The Court: Is there anything else you want to say before I take action on this request?

Mr. Bodle: No, sir, I believe I have related to the Court all I know concerning this matter of a pretrial notice.

The Court: This case has been pending since August 24, 1954, and I believe is it not, Miss Griffith, the oldest case we have?

Miss Griffith: Yes, the oldest civil case.

The Court: What is the next number we have? Do you know offhand when the next case was filed that is pending?

Miss Griffith: It is in the twenty hundreds, jumping from sixteen to twenty.

The Court: I have the docket sheet in front of me, and it shows that on June 21, 1957, there was a motion the plaintiff filed, which was a motion to continue the trial setting. It was continued on July 27, 1957.

In 1959, there was a notice, under Rule 11, to dismiss for failure to prosecute, which was sent by the clerk, and there was a hearing on that, as the record indicates, on March 25, 1959, and on June 4, 1959, an order was entered leaving the case on the docket.

[fol. 15] It was set for trial on July 22, 1959, and on July 2, 1959, an order was entered continuing the trial. The record doesn't indicate the reason for that continuance. Do you have knowledge of that?

Mr. Bodle: That was done by agreement. The motion originated with the defendant, and it was agreed to or concurred in by the plaintiff.

The Court: In view of the history of this case, insofar as its filing date and the attempts to have this matter come on for trial, as far as I know all of the trial settings have been at the Court's own motion and not as a result of the parties or the plaintiff to have the matter come on for trial, so it seems to me that there is no reasonable showing why (1) plaintiff's counsel could not have notified the Court and defense counsel about his whereabouts or the need of his being elsewhere, if there was a need of being elsewhere at the hour set for the time of the pretrial, and (2) his failure to be here, his failure to indicate in my view a reasonable reason for not being here—if counsel was engaged before a Court or had some other reason why he could not physically be here—but the reason stated, that he was preparing papers to be filed in another Court, and since there was no showing, in his telephone conversation either with Mr. Bodle or to Miss Griffith, that whatever he was doing, even though it was not before a Court, that it was of such urgent emergency reasons that he had to be in Indianapolis for the reason stated on the telephone, and (3) in view of the fact that he had notice, as indicated, and no effort was made previous to today to ask for a resetting, and whatever action I am taking, I don't know that I should base it on

that reason, but I think it is pertinent because of the fact of what you have said about his failure to appear for the deposition on notice, and in light of the apparent failure over the years of plaintiff to request that this case be tried [fol. 16] or brought to trial, it just seems to me that the Court should, in view of all these circumstances, exercise its inherent power to dismiss this action.

The Court is charged with a duty in the administration of the Court to dispose of or to try and dispose of cases.

It doesn't seem to me that counsel should put other counsel to the inconvenience and trouble and expense to his client to appear for a hearing without notice of it not going to be held, or without proper notice or advance notice, so it seems to me, in the light of the failure of plaintiff's counsel to indicate that he desires to prosecute this action—he indicates evidence by his action today in his failing to appear at the deposition and at the pretrial, and in light of the other matters about this case, the history of its being the oldest case and having been set only at the instance of the Court for trial, having been continued in one instance by the plaintiff and at the plaintiff's request, the Court now dismisses this case for failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action.

The Clerk is now directed to enter an order to this effect: Pursuant to the inherent powers of the Court and upon failure of plaintiff's counsel to appear at a pretrial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at the said pretrial, the cause is now dismissed.

Is there anything further, Mr. Bodle?

Mr. Bodle: No, your Honor, but I would appreciate having a copy of the proceedings and the order.

The Court: Very well. Thank you, Mr. Bodle, for your patience.

(And thereupon, the hearing in the above-captioned matter was concluded on Wednesday, October 12, 1960, at 3:30 o'clock P.M.)

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960—APRIL SESSION, 1961.

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

v.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 26, 1961

Before Hastings, Chief Judge, Schnackenberg and Knoch, Circuit Judges.

HASTINGS, Chief Judge. This is an appeal by plaintiff from an order of the district court entered October 12, 1960 dismissing this cause of action for failure of plaintiff's counsel to appear in court for a pre-trial conference scheduled for hearing on that date.

The order appealed from reads:

> "Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed."

[fol. 18] The history of this litigation is revealed by the record before us in this appeal.

On August 24, 1954, plaintiff William Link filed his complaint in the district court against defendant The Wabash Railroad Company to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On April 30, 1955, defendant filed its motion for judgment on the pleadings. On October 18, 1955, hearing was had on this motion. On November 30, 1955, the district court granted defendant's motion for judgment on the pleadings and ordered the cause dismissed. From this order of dismissal plaintiff appealed. On October 10, 1956, our court reversed and remanded the case for trial. *Link* v. *Wabash Railroad Company*, 7 Cir., 237 F. 2d 1 (1956), cert. denied, 352 U.S. 1003 (February 25, 1957). On March 13, 1957, the mandate from this court was filed in the district court.

Subsequently, the trial court set the case for trial for July 17, 1957. On June 27, 1957, on motion of plaintiff and defendant not objecting, the trial date of July 17, 1957 was vacated; and the cause was continued.

On August 17, 1957, defendant filed interrogatories for plaintiff to answer.

On February 24, 1959, the trial court on its own initiative gave notice to the parties, pursuant to Local Rule 11,[1] that the cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

[fol. 19] On March 24, 1959, plaintiff filed answers to defendant's interrogatories.

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[1] Local Rule 11 of the United States District Court, Northern District of Indiana, effective September 1, 1955 (now Local Rule 10, effective March 1, 1960) reads:

> "Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." See, *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992.

On March 25, 1959, hearing was had on the show cause order, and on June 4, 1959 the trial court entered an order retaining the case on the docket and setting it for trial for July 22, 1959.

On July 2, 1959, on defendant's motion, to which plaintiff agreed, the trial date of July 22, 1959 was vacated; and the case was continued.

On March 11, 1960, defendant filed additional interrogatories for plaintiff to answer. On April 15, 1960, after an extension of time granted by the trial court, plaintiff filed answers to the additional interrogatories.

On September 29, 1960, pursuant to Local Rule 12, effective March 1, 1960, the district court caused notice to be mailed to counsel for both parties scheduling a pre-trial conference in this case to be held in court on October 12, 1960, at 1:00 o'clock p.m.

It is undisputed that counsel for both parties received this notice of the pre-trial conference. It is undisputed that Local Rule 12 was in force at the times in question and was adopted pursuant to an order of the district court.

Local Rule 12 provides:

> "The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

Pre-trial procedure is authorized by Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A. Local rule making power generally in the district court is derived from 28 U.S.C.A. § 2071. Rule 83, Federal Rules of Civil Procedure, provides:

> "* * * In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

On October 12, 1960, at 1:00 o'clock p.m., the time fixed for the pre-trial conference, the district judge called this case for pre-trial hearing. Defendant's counsel was present in court. Plaintiff's counsel did not appear. At 3:00 [fol. 20] p.m., plaintiff's counsel not having appeared, the district court entered the foregoing order of dismissal.

The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.

The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:

> "He [plaintiff's counsel] called about 10:45 [on Wednesday, October 12, 1960], and said he was in Indianapolis—that he was busy preparing papers to file with the [Indiana] Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
>
> "At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
>
> "I asked him if he had contacted Mr. Bodle [defendant's counsel], and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition."

She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that this was the first and only attempt counsel made to have the pre-trial conference continued.

Defendant's counsel stated to the district court at this time that plaintiff's counsel called him on the preceding morning (October 11, 1960) from Indianapolis and stated that he expected to be in court for the pre-trial but did not know whether he would attend the taking of a deposition of plaintiff set for the next day. He further stated counsel said "he was doing some work on some papers." [fol. 21] He said that was the extent of his contact with him "since the time the Court sent out its notice of the pretrial," which he received on September 30, 1960. He had a call from the secretary of the district judge reporting the mes-

sage telephoned to her on the day of the hearing from Indianapolis by plaintiff's counsel.

The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any "reasonable reason" for not appearing. In view of all the circumstances surrounding counsel's action in the case, the trial court concluded that it should "exercise its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * * counsel having failed to give any good and sufficient reason for not appearing at the said pretrial." The case was then dismissed.

Plaintiff first contends that the dismissal was erroneous because nothing was scheduled for hearing on October 12, 1960 except the pre-trial conference and that this "had not been set by any *order* of the court but by a 'pre-trial notice'" sent to counsel. We think this contention is without merit. The "notice" was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court. Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. It is well settled that court rules have the force of law. *Weil* v. *Neary*, 278 U.S. 160, 169 (1929).

Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11, *supra*, or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to "regulate their practice in any manner not inconsistent with" the Federal Rules of Civil Procedure, as provided in Rule 83, *supra*. This case comes within the purview of that rule.

[fol. 22] Plaintiff maintains that Local Rule 12, *supra*, providing for pre-trial conferences, contains no sanctions calling for dismissal, or otherwise, and that in the absence of a provision for such sanctions the trial court erred. It is

sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary.

In *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992, where we upheld the dismissal of a cause under another local rule (for want of prosecution), we said that " * * * it is within the court's inherent power to so dismiss an action without authority of statute or rule," citing *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). On the general inherent power of a court to dismiss an action as a sanction for disobedience of a court order, see Annotation, 4 A.L.R. 2d 348.

Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings. *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 8 Cir., 245 F. 2d 613, 628 (1957), cert. denied, 355 U.S. 871; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, 444 (1942), cert. denied, 316 U.S. 671. In the recent case of *Jameson* v. *DuComb*, 7 Cir., 275 F. 2d 293, 294 (1960), this court upheld a dismissal because of the failure of plaintiff to be present at the trial on the date previously set for the trial. The court there found no abuse of discretion on the part of the trial court. As the court pointed out in *Refior, supra*, 124 F. 2d at 444, "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal." See also, *Joseph* v. *Norton Company*, D.C.S.D.N.Y. 24 F.R.D. 72 (1959), affirmed, 2 Cir., 273 F. 2d 65 (1959).

The sanction of dismissal has been imposed for failure to comply with pre-trial settings. *Dalrymple* v. *Pittsburgh Consolidated Coal Company*, D.C.W.D.Penn., 24 F.R.D. 260 (1959); *Wisdom* v. *Texas Co.*, D.C.N.D.Ala., 27 F. Supp. 922 (1939). In *Wisdom, supra*, plaintiff failed to appear at [fol. 23] the pre-trial hearing; and the court dismissed the case, on motion of defendant, for failure to prosecute the action and for failure to comply with the Federal Rules of Civil Procedure, pursuant to Rule 41(b) of such rules.

In 5 Moore's Federal Practice, p. 1038, note 15 (2d ed.), it is said that the dismissal in *Wisdom* "could also be regarded as a dismissal for failure to comply with an order of the court * * *." In *Dalrymple, supra*, 24 F.R.D. at page 262, the court noted that its local pre-trial rule was promulgated under Rules 16 and 83, Federal Rules of Civil Procedure, and said that the local rule "was designed to promote the expeditious processing of civil litigation * * *." "But unless appropriate sanctions are firmly imposed by the court for flagrant disobedience of its orders, the salutary purpose of [the local rule] will be entirely frustrated and the progress of litigation in this district hopelessly impeded."

Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. His brief refutes this contention wherein he states, "Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer than expected, so that it occupied the day which had been set for this pre-trial conference * * *." With knowledge of the time and place of the pre-trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed.

Plaintiff contends that the sanction of dismissal is unnecessarily harsh. In oral argument his counsel conceded that the district court might have disciplined him by imposing a lesser sanction. Many of the cases herein cited demonstrate that the character or degree of the sanction is within the discretion of the trial court. Under the circumstances of this case we find no abuse of discretion on the part of the trial court is dismissing the action.

Finally, in oral argument, plaintiff's counsel urged that his client should not be made to suffer a dismissal because [fol. 24] of counsel's failure in this matter. The short answer to this is that the action or lack of action on the part of counsel is that of his client.

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

We find no error in the dismissal of this cause by the district court. The order of dismissal appealed from is affirmed.

Affirmed.

No. 13221

SCHNACKENBERG, Circuit Judge, dissenting.

I take as my text this 1952 pronouncement of the Supreme Court of New Jersey:

> "The *dismissal of a party's cause of action* is drastic punishment and should not be invoked except in those cases where the actions of the *party* show a deliberate and contumacious disregard of the court's authority. * * * It seems to us that the plaintiff's conduct here did not warrant such severe punishment, particularly in view of the fact that the defendant would have suffered no loss by a further short adjournment which very well might have been granted on terms.
>
> "* * * But courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of *as their paramount objective.* * * *" (Italics supplied).

Allegro v. *Afton Village Corp.*, 87 A.2d 430, 432.

In this case there was an absence of the usual grounds for the involuntary dismissal of a suit. For instance there [fol. 25] cannot be a serious contention that plaintiff's suit was vexatious or fictitious, 27 C.J.S. 403. We had already

held in *Link* v. *Wabash R. R. Co.*, 237 F.2d 1, that his complaint stated a cause of action and we had remanded the case to the district court for trial. The United States Supreme Court denied *certiorari*, 352 U.S. 1003.

Defendant's counsel makes no effort to rely upon want of prosecution as a ground for the involuntary dismissal. Obviously defendant is in no position to make such a contention, inasmuch as it caused the district court to vacate the order setting the case for trial on July 22, 1959, and continue the case. Even if it had not done so, it is clear that its acquiescence in the delay would bar a dismissal of plaintiff's case for want of prosecution. 27 C.J.S. 445.

Therefore, there exists no basis for sustaining the dismissal order from which plaintiff has appealed, unless it is shown that there has been a disobedience by plaintiff of a court order. 27 C.J.S. 406. There is no such showing, because, first, there was no order commanding plaintiff to do anything and hence no possibility of his being disobedient, and, secondly, there is no evidence that the plaintiff even had any knowledge of the proceedings which the trial court described as its exercise of "its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * * ".

It is unnecessary to discuss the rationale of the holding that a pretrial conference was called in accordance with rules and that plaintiff's counsel did not appear. Certainly there is no suggestion that plaintiff was ever ordered or even requested to appear at such a conference. His counsel was requested to do so and did not appear because, as he informed the judge's secretary, he was engaged in some activity in connection with business before the Indiana Supreme Court, at which time he requested a delay of a day or two for the conference. This message was conveyed to the trial judge. It further appears that plaintiff's counsel had informed defendant's counsel the preceding morning of his absence at Indianapolis.

On this showing the court dismissed plaintiff's case. [fol. 26] If one accedes to the proposition that plaintiff's counsel, despite his commitment at Indianapolis, should have been in attendance at the pretrial conference, and that

his absence from the conference was inexcusable and made him amenable to discipline as an officer of the court, it is impossible to logically bridge the gap and to inflict disciplinary punishment upon his client rather than upon the attorney. The cause of action of the plaintiff for serious and permanent personal injuries and loss of earnings has been by the action of the court dismissed, not for any violation of any order by the plaintiff, but for an alleged dereliction by a lawyer who was held out to the plaintiff as one to whom he could entrust the handling of his case in the federal courts. It must be remembered that the attorney had been practicing for years in both the district court and this court of appeals.

The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action, bearing the stamp of approval of this court, was his property. It has been destroyed.[1] The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse.

[1] 28 U.S.C.A. rule 41 (b).

[fol. 27]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—May 26, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court entered therein on October 12, 1960, in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 28]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

ORDER DENYING PETITION FOR REHEARING—June 21, 1961

It Is Ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, Denied.

(Schnackenberg, C.J. voted to grant appellant's petition for rehearing.)

[fol. 29] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 30]

SUPREME COURT OF THE UNITED STATES

No. 422, October Term, 1961

WILLIAM LINK, Petitioner,

vs.

WABASH RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—November 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 20, 1961